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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Respondent, v. JOSEANTONIO MORENO TERAN, JR., Petitioner.	2 CA-CR 2009-0274-PR DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR-20052182

Honorable Stephen C. Villarreal, Judge

REVIEW GRANTED; RELIEF DENIED

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E C K E R S T R O M, Presiding Judge.

¶1 In this petition for review, Joseantonio Moreno Teran, Jr., challenges the trial court's dismissal of a petition for post-conviction relief Teran filed pursuant to

Rule 32, Ariz. R. Crim. P., asserting ineffective assistance of trial counsel. We will only disturb a trial court's ruling on such a petition if it has clearly abused its discretion. *State v. Bennett*, 213 Ariz. 562, ¶ 17, 146 P.3d 63, 67 (2006).

¶2 Driving while intoxicated in May 2005, Teran caused a serious motor vehicle accident by driving on the wrong side of the road and colliding head-on with another vehicle. A jury found him guilty of assault, criminal damage, driving under the influence of an intoxicant (DUI), extreme DUI, driving with an alcohol concentration of .08 or more, and three counts of aggravated assault. The state had alleged that seven of the twelve counts charged in the indictment were dangerous-nature offenses, and the jury found two of the three aggravated assault counts to be dangerous in nature, both based on Teran's use of a motor vehicle as a deadly weapon or dangerous instrument. Teran was convicted and sentenced in January 2007 to concurrent, presumptive terms of imprisonment, the longest an enhanced, 10.5-year term. This court affirmed the convictions and sentences on appeal. *State v. Teran*, No. 2 CA-CR 2007-0013 (memorandum decision filed Aug. 27, 2008).

¶3 Teran then sought post-conviction relief pursuant to Rule 32. In his petition, he asserted that defense counsel had been ineffective in not objecting to the trial court's failure to give a separate jury instruction concerning the dangerous-nature allegations. The state filed a comprehensive response to the petition, attaching to it an affidavit from Teran's trial counsel. In the affidavit, counsel explained why he had made the strategic decision not to request "the standard 'dangerous nature' jury instruction" nor

to object when the court omitted the instruction. After briefing was complete, the court dismissed the petition without a hearing. The court's minute entry ruling concludes:

> The Court finds that petitioner has not made a colorable claim of ineffective assistance of counsel. As set forth in [counsel]'s affidavit, [counsel]'s decision to not request that the Court instruct the jury on the dangerous nature issue was a matter of trial strategy. Therefore, [counsel]'s actions do not provide a basis for a claim of ineffective assistance of counsel.

¶4 To establish a claim of ineffective assistance of counsel, a defendant must show both that counsel's performance fell below prevailing professional norms and that the outcome of the case would have been different but for the deficient performance. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984); *State v. Nash*, 143 Ariz. 392, 397, 694 P.2d 222, 227 (1985). "To avoid summary dismissal and achieve an evidentiary hearing on a post-conviction claim of ineffective assistance of counsel," a petitioner must present a colorable claim on both parts of the *Strickland* test. *State v. Fillmore*, 187 Ariz. 174, 180, 927 P.2d 1303, 1309 (App. 1996); *see also* Ariz. R. Crim. P. 32.6(c) (summary dismissal appropriate unless material issue of fact or law exists), 32.8(a) (defendant entitled to hearing if material issue remains). A colorable claim is "one that, if the allegations are true, might have changed the outcome." *State v. Runningeagle*, 176 Ariz. 59, 63, 859 P.2d 169, 173 (1993).

¶5 Here, the trial court did not reach the prejudice portion of the *Strickland* test because it found Teran had failed to colorably allege that trial counsel's performance was deficient. *See Strickland*, 466 U.S. at 687 (to show conviction or sentence "resulted from a breakdown in the adversary process that renders the result unreliable," defendant must

show both "that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed . . . by the Sixth Amendment" and "that the deficient performance prejudiced the defense").

¶6 Reviewing courts indulge "a strong presumption" that counsel provided effective assistance. *Strickland*, 466 U.S. at 689; *State v. Hershberger*, 180 Ariz. 495, 497, 885 P.2d 183, 185 (App. 1994). "Matters of trial strategy and tactics are committed to defense counsel's judgment . . . ." *State v. Beaty*, 158 Ariz. 232, 250, 762 P.2d 519, 537 (1988); *accord State v. Espinosa-Gamez*, 139 Ariz. 415, 421, 678 P.2d 1379, 1385 (1984) ("Actions which appear to be a choice of trial tactics will not support an allegation of ineffective assistance of counsel."). Even if counsel's strategy proves ineffective, his or her tactical decisions normally will not constitute ineffective assistance of counsel; "'disagreements [over] trial strategy will not support a claim of ineffective assistance of counsel, provided the challenged conduct ha[d] some reasoned basis.'" *State v. Vickers*, 180 Ariz. 521, 526, 885 P.2d 1086, 1091 (1994), *quoting State v. Nirschel*, 155 Ariz. 206, 208, 745 P.2d 953, 955 (1987). Only if a decision is the product of "ineptitude, inexperience or lack of preparation," *State v. Goswick*, 142 Ariz. 582, 586, 691 P.2d 673, 677 (1984), will the usual, "strong presumption" that counsel provided effective assistance potentially give way. *Strickland*, 466 U.S. at 689.

¶7 The trial court's finding that counsel's "decision to not request that the Court instruct the jury on the dangerous-nature issue was a matter of trial strategy" had direct evidentiary support in defense counsel's affidavit. Moreover, it appears at least arguable that counsel's strategy was successful: Of the seven counts alleged to be

dangerous-nature offenses, the jury found Teran not guilty of manslaughter; failed to reach a verdict on the two counts of endangerment; and found only two of the four counts of aggravated assault to have been dangerous offenses. Thus, the record supports the trial court's conclusion that counsel's tactical decision had some reasoned basis.

¶8 Teran's petition for review largely mirrors his petition for post-conviction relief below but with the addition of new passages challenging the contents of defense counsel's affidavit and a contention that trial counsel's affidavit "demonstrated with extreme clarity" why the trial court should have deemed Teran's ineffective-assistance claim colorable and held an evidentiary hearing. Thus, Teran asserts:

> The fact remains that the jury was not properly instructed on the application of dangerous nature and that trial counsel did that deliberately in order to make an argument unfounded in the law, in an attempt to improperly preserve an issue for fundamental error review . . . [that] does not qualify for fundamental error review.

¶9 The state asserted in its response below that the trial court gave other instructions that defined all terms necessary for the jury to understand the dangerous-nature interrogatories on the forms of verdict. Neither in his reply below nor in his petition for review has Teran disputed this assertion. As noted above, the two charges found to be dangerous-nature offenses were both aggravated assaults involving the use of a deadly weapon or dangerous instrument.[1] The form of verdict for both of the counts

[1]The other two dangerous-nature allegations, which were based on Teran's intentionally or knowingly having caused serious physical injury, the jury did not find proven. Teran had been charged with aggravated assault of a minor under fifteen causing serious physical injury and aggravated assault causing serious physical injury, both allegedly dangerous-nature offenses based on the "intentional or knowing infliction of

found to be dangerous contained the following interrogatory: "We, the Jury, do further find the offense to be of a dangerous nature involving the use and/or threatening exhibition of a deadly weapon/dangerous instrument, to wit: a motor vehicle [___ Proven or ____ Not Proven] Beyond a Reasonable Doubt."

¶10 Given the relative simplicity and clarity of this language, it is difficult to see what further instruction was needed. Indeed, the language of the special interrogatory appears to be nearly identical to Revised Arizona Jury Instruction 6.04(f), cited by Teran. Teran has not explained, and we cannot imagine, what—except repetition—any such instruction might have contributed to the jury's understanding of the plain language of the interrogatory itself. Particularly given the facts of the case, when all charges against Teran arose from his having caused a collision between his vehicle and the victims', determining whether any of the charged offenses had involved the use of a motor vehicle hardly could be more straightforward. Hence, even if defense counsel should have requested such an instruction, which Teran has not established, we cannot envision any prejudice resulting from the trial court's omission of an instruction repeating the definition of "dangerous nature" as it pertained to these two counts of aggravated assault involving the use of a motor vehicle.

¶11 We find no abuse of the trial court's discretion in determining Teran had failed to state a colorable claim of ineffective assistance of counsel and thus denying

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serious physical injury." The jury found Teran guilty of the first of those charges but found the offense was not of a dangerous nature. As to the second charge, the jury found him guilty of only the lesser included, nondangerous offense of simple assault.

relief without an evidentiary hearing. Although we grant the petition for review, we likewise deny relief.

/s/ Peter J. Eckerstrom
PETER J. ECKERSTROM, Presiding Judge

CONCURRING:

/s/ J. William Brammer, Jr.
J. WILLIAM BRAMMER, JR., Judge

/s/ Garye L. Vásquez
GARYE L. VÁSQUEZ, Judge